Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1994

RALPH UNDERWAGER, AND
HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH,
MIMIM ROSE, NATIONAL CENTER
FOR PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, CHARLES VAUHGAN,
AND JAMES PETERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT CHARLES R. VAUHGAN IN OPPOSITION

September 23, 1994

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STATEMENT OF THE CASE

The relevant facts to the question addressed by this brief in opposition are as follows:

1. Petitioners Underwager and Wakefield, both psychologists, have written two books in which they "conclude that most accusations of child sexual abuse stem from memories implanted by faulty clinical techniques rather than from sexual contact between children and adults. The books have not been well received in the medical and scientific press." *Underwager v. Salter*, 22 F.3d 730, slip op. at 1-2 (7th Cir. 1994).

2. Munro and "60 Minutes" of Australia produced a television program highly critical of Underwager and Wakefield. In 1990, this program was broadcasted in Australia. During his interview for this program, Vaughan "made defamatory statements which became part of the program." Vaughan, however, "had no control over the broadcast of the program." District Court's Memorandum and Order at 3 (Jul. 16, 1992) (a-3).

3. Underwager and Wakefield sued Vaughan in the United States District Court for the Western District of Wisconsin.

4. "Vaughan is an Indiana attorney. He does not solicit business in Wisconsin and has no clients, employees, agents or property in the state." *Id.*

5. Pursuant to Fed. R. Civ. P. 12(b)(2), Vaughan moved to dismiss for want of personal jurisdiction. The district court agreed that "[t]he allegations and undisputed facts before [it] established that the [Wisconsin's] long arm statute does not provide for personal jurisdiction over [Vaughan] and that, in any

event, due process would preclude the exercise of jurisdiction." *Id.* at 5 (a-5).

6. Underwager and Wakefield appealed. The Court of Appeals affirmed. Vaughan did not do "anything in Wisconsin, sent anything into Wisconsin, [n]or had any way of knowing that a segment of an Australian TV series would end up being shown at a seminar in Wisconsin." *Underwager*, 22 F.3d at ___, slip op. at 4.

REASON FOR DENYING THE WRIT WITH RESPECT TO CHARLES R. VAUGHAN

Petitioners have waived their right to challenge the decisions of the district court and the court of appeals in dismissing Petitioners' claims against Vaughan for want of personal jurisdiction.

Pursuant to Sup. Ct. R. 14.1(a), "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." The Petition neither contains an argument challenging, nor does it even mention, the district court's dismissal of Vaughan and the court of appeals' affirmance thereof. Therefore, Petitioners have waived their right to litigate that question before this Court. "Absent unusual circumstances, . . . , we are chary of considering issues not presented in petitions for certiorari." *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

CONCLUSION

For the foregoing reasons, Respondent Charles R. Vaughan respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX*

The District Court's
Memorandum and Order (Jul. 16, 1992) . . . a-1

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*The appendix to the Petition does not include all the materials required by Sup. Ct. R. 14.1(k)(i).

(REPRODUCED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Plaintiffs,

v.

MEMORANDUM AND ORDER
92-C-229-S

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH
INSTITUTE, NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, MIKE
MUNRO, CHANNEL 9 AUSTRALIA,
"60 MINUTES" OF AUSTRALIA,
CHARLES VAUGHAN, and JAMES
PETERS, SR.

Defendants.

Plaintiffs Ralph Underwager and Hollida Wakefield bring this action alleging defamation and conspiracy to injure against the defendants based upon certain publications and statements which allegedly impugned their professional capabilities. The matter is presently before the Court on the motion of defendants Mimi Rose, Charles Vaughan and James Peters, Sr. to dismiss for lack of personal jurisdiction. Also before the Court is a motion by defendant National Center for Prosecution of Child Abuse to dismiss pursuant to Rule

9 (a) asserting that it lacks capacity to be sued, and a motion pursuant to Rule 12(b)(6) advanced by defendants Patricia Toth, Mimi Rose, National Center for Prosecution for Prosecution of Child Abuse, American Prosecutors Research Institute, National District Attorneys Association, and James Peters, Sr. challenging the sufficiency of the claim based upon conspiracy to injure under § 134.01, Wis. Stat.

Jurisdiction is based on 28 U.S.C. § 1332. The following is a summary of the factual allegations of the complaint, together with facts from the affidavits offered in support of the 12(b)(2) motions.

FACTS

Plaintiff Ralph Underwager is a Minnesota resident and a licensed psychologist. Since 1984 plaintiff Underwager has engaged in consulting and evaluation concerning civil and criminal litigation involving charges of child sexual abuse. In 1988 he published a book entitled "Accusations of Child Sexual Abuse" which was disseminated throughout the United States.

The plaintiff Hollida Wakefield is a licensed psychologist and the administrator of the Institute for Psychological Therapies in Northfield, Minnesota.

The defendant American Prosecutors Research Institute (APRI) is a non-profit research organization affiliated with the National District Attorneys Association with offices of Virginia. The defendant National Center for Prosecution of Child Abuse is an unincorporated program of defendant APRI which has no employees of its own, but is operated by employees of defendant APRI.

Defendant Patricia Toth has been employed by APRI since 1989 as the Director of defendant National

Center. Defendants James Peters and Mimi Rose were employed by defendant APRI as senior staff attorneys for defendant National Center during the period relevant to this complaint. Neither defendant Peters nor defendant Rose has ever been to Wisconsin, nor did either solicit or conduct business in the state.

Defendant Anna Salter is a psychologist and a resident of New Hampshire. In 1990 defendants Peters, Toth and Rose, acting as agents of defendant APRI, caused defendant Salter to be hired to write a monograph directed at challenging the plaintiffs' book, "Accusations of Child Sexual Abuse." Defendant Salter drafted the monograph which included defamatory statements injuring the plaintiffs. Defendant Salter provided the monograph to defendants Peters, Toth and Rose for distribution through defendant National Center for Prosecution of Child Abuse. Neither defendant Peters nor defendant Rose distributed the monograph into Wisconsin.

Defendant Charles Vaughan is an Indiana attorney. He does not solicit business in Wisconsin and has no clients, employees, agents or property in the state.

Prior to September 1990 the defendants Mike Munro and "60 Minutes" of Australia produced a television program which included defamatory statements about the plaintiffs and was broadcast in Australia in September 1990. Defendants Peters, Vaughan and Salter were interviewed for the television program and made defamatory statements which became part of the program. Defendants Peters and Vaughan had no control over the broadcast of the program.

Between October 29 and November 1, 1990, defendant Toth played the videotape of the "60 Minutes" program at the Midwest conference on Child Sexual Abuse and Incest, at Madison, Wisconsin. In November

1990 defendant Rose played the videotape at a conference in Illinois, and in 1991 defendant Rose played the videotape at a conference in Arizona.

MEMORANDUM

The Court addressed defendants' procedural and jurisdictional challenges prior to addressing the substantive motions under Rule 12(b)(6), Federal Rules of Civil Procedure.

Rule 9(a) Motion of National Center

The defendant National Center for Prosecution of Child Abuse moves to dismiss the complaint against it on the ground that it is not a party subject to suit within the meaning of Rule 17, Federal Rules of Civil Procedure. The complaint alleges that National Center is a "program of the defendant American Prosecutors Research Institute." Defendants establish by affidavit of Toth that the National Center is operated by employees of APRI and has no employees of its own. Furthermore, the program is funded by a grant received by APRI which is used to operate the National Center.

Under these circumstances it is clear that dismissal of the National Center as a defendant is appropriate. The facts establish that the Center is merely an arm of defendant APRI, which is a legal entity subject to suit, and that the activities of the National Center are, in fact, activities of employees of APRI. Where the actual legal entity is named as a defendant, it is appropriate to dismiss a nominal entity such as the National Center for Prosecution of Child Abuse. Testa v. Janssen, 482 F.Supp. 1195, 1200 (W.D. Pa. 1980).

Personal Jurisdiction Motions

Defendants Rose, Peters and Vaughan move to dismiss the complaint against them pursuant to Rule 12(b)(2) asserting the absence of personal jurisdiction. Personal jurisdiction in a diversity action is determined by reference to the Wisconsin long arm statute. If personal jurisdiction is appropriate under the long arm statute, the Court then considers whether jurisdiction is consistent with constitutional limits. Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1195, (1985). The allegations and undisputed facts before the Court established that the long arm statute does not provide for personal jurisdiction over the moving defendants and that, in any event, due process would preclude the exercise of jurisdiction.

The provisions of the long arm statute relied upon by the plaintiffs in support of personal jurisdiction is § 801.05(3), Wis. Stat., which provides:

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s.801.11 under any of the following circumstances:
>
> * * *
>
> (3) LOCAL ACT OR OMISSION. In any action claiming injury to person or property within or without this state arising out of an act or omissions within this state by the defendant.

It is undisputed that defendants Peters and Rose have never set foot in the State of Wisconsin and that defendant Vaughan owns no property and solicits no business in the state. It is further undisputed that they do not transact business in Wisconsin, nor have they directed any publications or broadcasts into

Wisconsin. Recognizing these facts plaintiffs assert two theories for expanding the meaning of "an act or omission of Wisconsin." First, plaintiffs allege that the videotape interviews of the defendants Vaughan and Peters constitute an act within the State of Wisconsin, "by electronic means." Plaintiffs offer no support for this novel theory. Under this theory and recorded statement would constitute an act within Wisconsin if the statement into Wisconsin, and, as will later be seen, such an interpretation of the Wisconsin long arm statute would be violative of due process rights.

The second theory advanced by the plaintiffs as to defendants Rose and Peters is that they were a part of a conspiracy and, therefore, the action of defendant Toth in playing the videotape in Wisconsin can be attributed to them. This theory is equally unpersuasive in light of the fact that defendants Toth, Rose and Peters were all employees of the same organization, defendant APRI, who were acting within the scope of their employment when distributing information and conducting seminars. Under such circumstances, the acts of the defendants are acts of their employer organization and cannot support a claim of conspiracy. Elbe v. Wausau Hospital Center, 606 F.Supp. 1491, 1502 (W.D. Wis. 1985). A business organization and its employees cannot conspire with one another in furtherance of the business organization's purpose. Id. For purposes of determining personal jurisdiction, the defendants' contacts with Wisconsin are not to be judged according to their employer's activities, but each defendant's contacts with the State must be assessed individually. Calder v. Jones, 465 U.S. 783, 790 (1984). Since none of the moving defendants participated in the publication of the alleged defamatory statements in Wisconsin, those actions cannot be attributed to them for purposes of personal jurisdiction.

Assuming the Wisconsin long are statute could be stretched to encompass defendants Vaughan, Peters and Rose, the due process clause would certainly preclude it. The most analogous Supreme Court decision is Calder v. Jones, where the Supreme Court permitted the exercise of personal jurisdiction by a California court over a reporter and an editor of the National Enquirer who had made personal trips to California and caused to be published an article concerning actions that occurred in California which impacted foreseeable on the plaintiff who resided in California. Under these circumstances the Supreme Court held that the due process clause of the Fourteenth Amendment would not be violated by asserting personal jurisdiction over the defendants.

The facts of this case starkly contrast with those of Calder. None of the defendants' actions concerning the statements occurred in Wisconsin, the defendants did not reside in Wisconsin, and the publications were not directed to Wisconsin. None of the bases for asserting personal jurisdiction in Calder are present in this case. The assertion of personal jurisdiction in Wisconsin over defendants who have never been in Wisconsin and who did not direct any publication into the State in a suit involving injury to a Minnesota plaintiff would unquestionably offend traditional notions of fair play and substantial justice. Id. at 788.

The motions of defendants Peters, Rose and Vaughan to dismiss for lack of personal jurisdiction must be granted.

Motion to Dismiss Claim Under § 134.01, Wis. Stat.

The defendants American Prosecutors Research Institute and patricia Toth move to dismiss the claim under Wisconsin law, § 134.01, Wis. Stat., based upon a conspiracy to injure asserting that neither malice nor

conspiracy has sufficiently been alleged. The Court finds that this motion can be granted as to defendant Toth, but not as to the defendant APRI.

Wisconsin Statute § 134.01 makes it unlawful for any two or more person to "combine, associate, agree, mutually undertake, or consort together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession by an means whatever. . ."

As it concerns the defendant Toth, the allegations of the complaint fail to state a claim because they fail to allege a conspiracy in which she is involved. The only allegations of the complaint which allege concerted activities by separate defendants are the allegations that defendants Toth, Peters and Rose, acting as agents of APRI, caused defendant Salter to draft a monograph which they later received and distributed. The complaint does not allege, nor can a reasonable inference be made, that the actions of Toth concerning the monograph were not in furtherance of her employer's purpose or outside the scope of her employment. The limited actions concerning the monograph taken by Toth in furtherance of her employment with APRI cannot form the basis of a claim of conspiracy against her. Elbe, 606 F.Supp. at 1502.

The allegations are sufficient, however, to support a claim that defendants Salter and APRI agreed or mutually undertook to create and distribute the monograph.

Additionally, the allegations of the complaint are sufficient to allege that such actions were taken "willfully or maliciously" to damage the reputation of plaintiffs. Defendants APRI's argument to the contrary relies upon a sleight of hand application of Rule 9(b), Federal Rules of Civil Procedure. Rule 9(b) permits

allegations of malice to be averred generally as in paragraph 21. Furthermore, the fact that there was apparently no pecuniary gain accruing to the defendant APRI as a result of the publication's statements against the plaintiffs makes it reasonable to infer that such actions were taken for the willful purpose of injuring plaintiffs' reputations.

Defendant APRI's assertion that the "circumstances" must be pled in "detail" is clearly a distortion of Rule 9(b), which imposes such a requirement on allegations of fraud or mistake, but expressly does not impose such a requirement on allegations of malice or intent. For obvious reason, the requirement of particularity applicable to fraud cannot be imposed upon allegations of the defendants' state of mind which generally cannot be established by direct evidence but must be inferred from surrounding circumstances. Malice and conspiracy have been sufficiently alleged against defendant APRI and its motion to dismiss must be denied.

ORDER

IT IS ORDERED that the motion of defendant National Center for Prosecution of Child Abuse to dismiss pursuant to Rule 9(a) based upon lace of capacity to be sued is GRANTED.

IT IS FURTHER ORDERED that the motions of defendants Mimi Rose, James Peters, Sr. and Charles Vaughan to dismiss pursuant to Rule 12 (b)(2) for lack of personal jurisdiction are GRANTED.

IT IS FURTHER ORDERED that defendant patricia Toth's motion to dismiss the claim based upon Wis. Stat. § 134.01 is GRANTED.

IT IS FURTHER ORDERED that defendant's APRI's motion to dismiss the claim based upon Wis. Stat. § 134.01 is Denied.

Entered this 16th day of July, 1992.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Court

The first page of this memorandum and order contains the following information:

> Copy of this document has been mailed to the following: Attys. Sutton, Moore, Zaleski, Arntsen, Keller, and Vaughan this 16th day of July, 1992.
>
> /s/
>
> By: _____
> Secretary to Judge John C. Shabaz